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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

TONY RAY McGIRT,

Petitioner,

V.

STATE OF NORTH CAROLINA,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of North Carolina

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

WHETHER A POLICE OFFICER IS JUSTIFIED IN CONDUCTING A "PAT-DOWN" FRISK, AFTER STOPPING A PERSON FOR THE MINOR TRAFFIC INFRACTION OF VIOLATING A STATE'S SEAT BELT LAW, WHEN THE OFFICER DOES NOT OBSERVE ANY CRIMINAL ACTIVITY OR OTHER SUSPICIOUS CONDUCT, AND WHEN SUCH SEARCH IS MOTIVATED BY THE OFFICER'S KNOWLEDGE THAT THE INDIVIDUAL IS A PREVIOUSLY CONVICTED DRUG FELON AND HIS UNPARTICULARIZED BELIEF OR HUNCH THAT DRUG DEALERS NORMALLY CARRY WEAPONS?

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OPINIONS BELOW

The opinion of the North Carolina Supreme Court is published in *State v. McGirt*, 481 S.E.2d 288 (N.C. 1997).

The opinion of the North Carolina Court of Appeals is published in *State v. McGirt*, 468 S.E.2d 833 (N.C. Ct. App. 1996).

The judgment of the Superior Court of North Carolina, Scotland County is not reported and is reprinted in the Appendix.

JURISDICTIONAL STATEMENT

This petition for writ of certiorari arises from an opinion rendered by the Supreme Court of North Carolina. That opinion, having been issued on appeal from the North Carolina Court of Appeals, was entered on March 7, 1997.

After denying Petitioner's pre-trial motion to suppress evidence, the Superior Court of North Carolina, Scotland County (B. Craig Ellis, J., presiding) entered judgment sentencing the Petitioner on April 20, 1995 to a term of ten (10) to twelve (12) months for the offense of possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1 and carrying a concealed weapon in violation of N.C. Gen. Stat. § 14-269. The Petitioner, having duly preserved his right to appeal the denial of his pre-trial motion to suppress, gave notice in open court of appeal to the North Carolina Court of Appeals.

After hearing the case on February 21, 1996, a divided panel of the Court of Appeals affirmed the judgment entered by the trial court. On May 21, 1996, pursuant to N.C. Gen. Stat. § 7A-30(1) and (2), Petitioner filed timely notice of appeal as

a matter of right to the North Carolina Supreme Court. A sharply divided Supreme Court affirmed the decision of the Court of Appeals in an opinion filed on March 7, 1997.

The Petitioner now submits a timely petition for writ of certiorari. The United States Supreme Court enjoys jurisdiction to review the judgment of the Supreme Court of North Carolina pursuant to its authority, granted under 28 U.S.C. § 1257(a), to review final judgments rendered by the highest court of a State where a title, right, privilege, or immunity is specially set up or claimed under the Constitution.

The United States Supreme Court should grant discretionary review because (1) the North Carolina Supreme Court has decided an important federal question in a way that conflicts with relevant decisions of this Court and (2) the North Carolina Supreme Court has decided an important federal question in a way that conflicts with the decisions of other State courts of last resort and with the United States Courts of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

STATEMENT OF THE CASE

On October 27, 1994 at approximately 9:30 a.m., the Petitioner, Tony Ray McGirt, was stopped by Detective T.

Butler of the Scotland County Sheriff's Department for operating a motor vehicle without a seat belt. Detective Butler stepped up to the Petitioner's vehicle and asked the Petitioner for his driver's license, which the Petitioner promptly produced. Detective Butler directed the Petitioner to exit the automobile. After the Petitioner exited the automobile, the officer patted down the Petitioner, searching him without the Petitioner's consent.

Detective Butler subsequently placed the Petitioner under arrest and Butler charged Petitioner with possession of a concealed weapon and possession of a firearm by a convicted felon. Detective Butler found no other contraband during the search.

On January 10, 1995, the Grand Jury in Scotland County, North Carolina, returned a bill of indictment against the Petitioner, Tony Ray McGirt, charging him with the October 27, 1994 offenses of carrying a concealed weapon, a .22 caliber handgun, and possession of a firearm by a felon. During the April 20, 1995 session of the Superior Court, Scotland County, North Carolina, the Honorable B. Craig Ellis, Judge of the Superior Court, heard the Petitioner's pre-trial motion to suppress evidence obtained by virtue of a search without a search warrant. Detective Butler testified that, "I pat down everyone I stop, no matter what it's for." At the close of the hearing, the motion was denied.

Thereafter, the Petitioner, preserving his appellate rights, entered a plea of guilty to the offense of possession of a firearm by a felon and carrying a concealed weapon. McGirt was sentenced to a minimum of ten (10) months and a maximum of twelve (12) months in the custody of the North Carolina Department of Corrections.

The Petitioner appealed his conviction to the North Carolina Court of Appeals. A divided panel of the Court of Appeals upheld the trial court's order denying the Petitioner's motion to suppress, holding that the evidence supported a conclusion that the deputy sheriff had reasonable ground to stop, search, and arrest the Petitioner. The dissenting opinion filed in the case ascertained that the search violated the Fourth Amendment. The dissent reasoned that, under the circumstances, the deputy sheriff had reasonable grounds to believe that the Petitioner was "armed and presently dangerous." *State v. McGirt*, 468 S.E.2d 833, 836 (N.C. Ct. App. 1996)(Smith, J., dissenting). Furthermore, the dissent maintained that the State failed to meet its burden of proving that the Petitioner had consented to the search. On May 21, 1996, pursuant to N.C. Gen. Stat. § 7A-30(1) and (2), Petitioner filed notice of appeal to the Supreme Court as a matter of right. After a February 21, 1996 hearing, a sharply divided Supreme Court affirmed the decision of the Court of Appeals in a March 7, 1997 opinion.

REASONS FOR GRANTING THE WRIT

This Court has consistently held that, in determining the constitutionality of a "pat down" search for weapons, "due weight must be given" to the "specific reasonable inferences" that the officer "is entitled to draw from the facts in light of his experience," and not "to his inchoate and unparticularized suspicion or 'hunch.'" *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Yet, despite the Court's clear and consistent directive, lower courts have deviated from this rationale, allowing frisks without recognition of the requisite standard. Further, police officers on the streets have derogated this constitutional rule to the point that they, as Detective Butler testified, "I pat down everyone I stop, no matter what it's for." Such a policy is the antithesis of the constitutional rule prohibiting such

unreasonable searches and prohibiting the use of such illegally obtained evidence.

Under the exclusionary rule, items obtained through an unconstitutional search and seizure may not be used against a criminal defendant. *Mapp v. Ohio*, 367 U.S. 643 (1961). This rule stands in recognition of the fact that exclusion of such evidence is "the only effective deterrent to police misconduct in the criminal context." Without the exclusionary rule, "the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words.'" *Terry v. Ohio*, 392 U.S. at 12 (1968).

The present case demonstrates this reduction of rights to a form of words not having any real substance. Here, the North Carolina Supreme Court has chosen to affirm the denial of Petitioner's motion to suppress and has determined that, where the officer has knowledge of a defendant's prior conviction for a narcotics offense and where the officer has an unparticularized belief that drug dealers "normally carry weapons," a pat down search for weapons is constitutionally permissible, even when the defendant was stopped solely for the infraction of violating the state's mandatory seat belt law. Because this determination conflicts sharply with the decisions of this Court, of the United States Courts of Appeals, and of the State courts of last resort, the North Carolina Supreme Court's decision to affirm the lower court's admission of this unconstitutionally obtained evidence must be reversed and the judgment against the Petitioner must be vacated. Anything less will reduce the constitutional guarantee against unreasonable search and seizure even further, from a mere "form of words" to an expression "without form and void."

While the Constitution substantively mandates that an officer have a search warrant to conduct a search, this Court

has established that "searches conducted outside the judicial process without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). These exceptions are "jealously and carefully drawn." *Id.*; *see Ybarra v. Illinois*, 444 U.S. 85 (1979)("The Terry case created an exception to the requirement of probable cause, an exception whose 'narrow scope' this Court 'has been careful to maintain'"). While the State has the burden of showing that the situation makes use of an exception imperative, *Coolidge v. New Hampshire*, 403 U.S. at 443, it cannot do so, here, where the exception urged, abolishes the rule of Constitutional law.

In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court carved out an exception which permits a police officer, under certain circumstances, to conduct a limited search for weapons of an individual who has been lawfully stopped. In *Terry*, a seasoned police officer observed two men engaging in behavior which led the officer to form the hypothesis that they were contemplating a robbery. This Court acknowledged that "even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security." *Id.*, 392 U.S. at 24-25. Nevertheless, it concluded that, given the fact that the suspects were apparently contemplating some specific act which was likely to involve the use of weapons, the officer could reasonably conclude that they were armed and presently dangerous. Based on these observations and the circumstances, the officer could constitutionally subject the suspects to a pat down search for weapons. *Id.* This Court concluded that an officer has a "narrowly drawn authority" to conduct a pat down search for weapons when he reasonably believes that "he is dealing with an armed and dangerous individual." *Id.*, 392 U.S. at 27. "In

determining whether the officer acted reasonably in the circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.*; *See also United States v. Sokolow*, 490 U.S. 1 (1989).

The Court's holding in *Terry* was an explicitly narrow one.

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. *Id.*, 392 U.S. at 30.

Thus, this Court implicitly held that a police officer may only conduct a pat down search for weapons after the initial stages of the encounter produce nothing to dispel his reasonable fear for his own or others' safety.

Justice Harlan, concurring, took exception to this implicit holding by suggesting that there should be an

automatic and immediate right to frisk if the reason for the stop is an articulable suspicion for a crime of *violence*. *Id.*, 392 U.S. at 33. Indeed, Justice Harlan expanded on this conception in the companion case to *Terry*. An automatic right to frisk, Justice Harlan opined, arises "when an officer lawfully stops a person suspected of a crime whose nature creates a substantial likelihood that he is armed. . . . If the nature of the suspected offense creates no reasonable apprehension for the officer's safety, I would not permit him to frisk unless other circumstances did so." *Sibron v. New York*, 392 U.S. 40, 74 (1968).

This concurring statement has been ably explained by Professor LaFave. "A protective search may always be made when the stopping is to investigate what appears to be a crime of violence. For other crimes . . . it would apparently take noticeable bulges in the suspects clothing, movements by the suspect toward his pockets, or similar observations to give rise to a substantial possibility that the suspect was armed." Wayne R. LaFave, "'Street Encounters' and the Constitution: *Terry, Sibron, Peters*, and Beyond," 67 MICH. L. REV. 39, 88 (1968). Certainly, a "policy" of frisking every person that an officer approaches is patently unconstitutional.

Justice Harlan's concurrence was apparently subsequently adopted in *Adams v. Williams*, 407 U.S 143 (1972). In *Adams*, the officer, responding to an anonymous tip that the defendant had narcotics and a gun, asked defendant to open his car door. After the defendant instead lowered the window, the officer reached into the car and found a loaded handgun precisely where the informant said it would be. This Court held that the search and seizure was constitutional.

Unlike the Petitioner's case, however, *Adams* was a case in which the defendant was suspected of and stopped for

his involvement in a crime of violence. This Court emphasized that the intrusion was reasonable in light of the fact that the defendant disobeyed the officer's specific request to step out of the car. Specific circumstances existed to create a reasonable apprehension for the officer's safety. *Adams v. Williams*, 407 U.S. 143 (1972).

This Court's decisions and decisions of the United States Courts of Appeals or of the State courts of last resort clearly suggest two principles, relevant to the case at hand, governing the circumstances in which an officer may reasonably believe that a lawfully stopped defendant is armed and presently dangerous. First, the Courts are clear that if a defendant is stopped on reasonable suspicion of committing a non-violent crime, then other particularized circumstances must exist before the officer may reasonably believe that the defendant is armed and presently dangerous, *even when the defendant is known for his prior involvement with drug transactions*. Admittedly, the defendant's past involvement with drug transactions is a factor which may be considered in determining the reasonableness of this conclusion; however, this factor, in and of itself, can never be conclusive. Second, there is a split among the courts as to whether an individual, stopped on suspicion of drug activity, may be subjected to a pat down frisk for weapons absent other particularized circumstances which suggest that the individual is armed and presently dangerous. However, absent such particularized circumstances, a pat down frisk cannot be sustained where the stop, *of even a suspected drug dealer*, was not a stop effected to investigate such individual's drug related activity.

A. THE DECISION OF THE NORTH CAROLINA SUPREME COURT CONFLICTS SHARPLY WITH CLEAR AND UNIFIED AUTHORITY UNDER WHICH A PAT DOWN SEARCH FOR WEAPONS

IS UNCONSTITUTIONAL, ABSENT OTHER PARTICULARIZED CIRCUMSTANCES, IF THE DEFENDANT HAS BEEN STOPPED ON REASONABLE SUSPICION OF COMMITTING A NON-VIOLENT CRIME, EVEN WHEN THE DEFENDANT IS KNOWN FOR HIS PRIOR INVOLVEMENT WITH DRUG TRANSACTIONS.

In this case, the North Carolina Court of Appeals and the Supreme Court of North Carolina based the decision to affirm the denial of Petitioner's motion to suppress essentially on Detective Butler's assertion that he knew the Petitioner had a prior involvement with drug transactions (including a prior drug related conviction) and that he believed drug dealers "normally carry weapons." No other particularized circumstances existed which could lead to the inference that the Petitioner was armed and presently dangerous. No evidence was elicited to indicate that the Petitioner was uncooperative, that there were any noticeable bulges, or that the Petitioner made any movements which would have led the officer to reasonably believe that the Petitioner was armed and presently dangerous. The Petitioner was stopped for the infraction of violating the State's mandatory seat belt law. Under these facts, the North Carolina Supreme Court's conclusion that the pat down was constitutionally permissible represents a break from precedent establishing a rule that is deleterious to the protection embodied in the Fourth Amendment.

As a matter of constitutional law and right, an individual who has been stopped for a minor traffic offense may be subjected to a pat down frisk for weapons only if particularized circumstances exist which allow the officer to reasonably believe that the individual is armed and presently dangerous. In *Pennsylvania v. Mimms*, this Court held that a pat down search for weapons was justified after the officer,

having stopped the defendant for a traffic offense, noticed a bulge under the driver's[1] jacket that might be a weapon. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

In *State v. Gannaway*, the Minnesota Supreme Court held that a defendant, after being stopped for a minor traffic offense, could be frisked for weapons when the defendant seemed intent on reaching into his outer coat pocket, after being specifically warned not to do so. *State v. Gannaway*, 191 N.W.2d 555 (Minn. 1971). Similarly, the Pennsylvania Supreme Court has held that an officer had reasonable and articulable suspicion that the defendant was armed and presently dangerous when, after being stopped for a traffic infraction, the defendant leaned briefly to his right and towards the floor and failed to obey the officer's instruction to place his hands on the steering wheel and after the officer saw a metal pipe wedged between the driver's seat and the door. *Commonwealth v. Morris*, 644 A.2d 721 (Pa. 1994), *pet. den.*, 63 USLW 3421.

In *State v. Williamson*, the Wisconsin Supreme Court held that a pat down search, conducted after defendant's car was stopped for being parked on the curb of the road with its interior lights on and after the officer concluded that the

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[1] While the State has attempted to argue, without precisely articulating, some additional "automobile exception" to the "stop and frisk exception," no support for that "exception within an exception" can be found in this Court's decisions nor should it be allowed to be established through the precedent of this case. Nothing in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), nor otherwise implies that a person who operates a motor vehicle has less protection from unreasonable searches and seizures than a person walking along a street.

defendant was "waiting to see what the police were going to do," was constitutionally justified. This justification was supported by the fact that the defendant was driving at night, without any identification of any sort on his person, including a license. *State v. Williamson*, 206 N.W.2d 613 (Wis. 1973).

Clearly, then, where a suspect has been stopped for a minor traffic offense, certain other particularized circumstances must exist before a pat down search is constitutionally permissible. However, important to the Petitioner's case here, when the stop is for a minor traffic offense, the mere fact that the officer knows of prior illegal conduct by the defendant, or even that the officer has investigated such conduct, is not the type of particularized circumstance which can, of itself, permit the reasonable inference that the defendant is armed and presently dangerous.

In *State v. Valentine*, the New Jersey Supreme Court considered whether the lower court erred in admitting a knife as evidence in the trial and subsequent conviction of the defendant for the offense of possession of a knife by a person previously convicted of a crime. *State v. Valentine*, 636 A.2d 505 (N.J. 1994). The officer "recognized [the defendant] from previous encounters" and "was aware that defendant had a lengthy arrest sheet, 'that he had been involved in weapons offenses, armed robberies, prior C.D.S. complaints and stuff like that.'" *Id.* at 506-07. However, critical to the court's decision that this pat down search was constitutionally permissible was the fact that, before conducting the pat down, the officer observed the defendant duck behind a tree after midnight in a poorly lit area; that the defendant was in a high crime area in which the officer had made over a hundred arrests; and that the officer, after addressing the defendant, was "uncomfortable" with the defendant's responses and demeanor, including the defendant's refusal to make eye contact, his weak

excuses, and the fact that he kept his hands in his pockets. *Id.* at 508, 511. In fact, the particularized circumstances of their encounter made the officer so uncomfortable that he radioed for backup. *Id.* at 508. While the defendant's prior criminal activity was *one* factor permitting the reasonable inference that the defendant was armed and presently dangerous, this factor was not sufficient aliunde to justify a pat down search. "The Supreme Court has implied that knowledge of a person's criminal history would be a factor supporting a legitimate frisk," the New Jersey Supreme Court wrote. "However, a frisk never will be justified based solely on an officer's knowledge of a suspect's criminal history." *Id.* at 511.

The *Valentine* court distinguished its case from the case presented in *United States v. Hairston*, 439 F.Supp. 515 (N.D. Ill. 1977). In *Hairston*, the defendant, having been indicted for receipt of a firearm by one having previously been convicted of a felony, moved to suppress the evidence. The firearm was seized in a pat down search conducted after the defendant was stopped for driving with a noisy muffler. Even though the defendant was a convicted felon and the stop occurred in a high crime area, the United States District Court for the Northern District of Illinois held that the pat down frisk was unlawful. To adopt the government's argument that the defendant's status as a convicted felon justified the search would, in the words of the court, "give carte blanche to law enforcement agencies to search anyone who had previously been convicted of a felony. The Fourth Amendment contains no such exception and this court is not about to condone such a position. In the absence of other circumstances from which the police could reasonably suspect that Hairston was armed, his prior conviction cannot justify this search and seizure." *Id.* at 518. In fact, even if the officer's assertion that he saw a bulge in the defendant's clothing were true, this would still not provide a circumstance sufficient to authorize the search. The

search would nonetheless be "*highly* unreasonable." *Id.* (emphasis added).

Similarly, in *State v. Giltner*, the Supreme Court of Hawaii considered whether an officer, after responding to complaints of minor public disturbance, could perform a pat down search for weapons on a defendant whom he knew was, on a prior occasion, offensively armed, even though the officer observed nothing unusual about the defendant's conduct on this occasion. The court held that the pat down search was constitutionally impermissible. *State v. Giltner*, 537 P.2d 14 (Haw. 1975). Given that there was nothing unusual about the defendant's conduct or about the surrounding circumstances, "it was not enough that on a previous occasion, personally known to the officer, the defendant had been offensively armed." Although it might be one factor leading to the reasonable inference that the defendant was armed and presently dangerous, "the reputation of an individual for carrying arms is not, in and of itself, a sufficient basis for a stop and frisk." *Id.* at 17.

Finally, in *United States v. Woodall*, the Eighth Circuit Court of Appeals held that an officer's pat down search of the defendant, conducted after the defendant was stopped for rolling through a stop sign, was lawful. *United States v. Woodall*, 938 F.2d 834 (8th Cir. 1991). The officer, who recognized the defendant as a man he had arrested a few weeks earlier for a narcotics violation, "knew that narcotics traffickers frequently carry weapons." *Id.* at 835. However, the court's decision treated the defendant's prior arrest as only one of several particularized circumstances, only the totality of which justified the search. In particular, the court was impressed by the fact that, after the officer began to follow the defendant's car, the car slowed down, passing over the center line, and the officer observed the defendant bend over to the floorboard at

least twice, a movement typically made by people who are carrying weapons or contraband in their cars. *Id.* at 835-836.

In the case below, the North Carolina Supreme Court held that, the mere fact that the officer knew the defendant was a convicted felon who had previously engaged in cocaine trafficking combined with the officer's inchoate assumption that such traffickers "normally carry weapons," was sufficient to justify the search "even in the face of a cooperative defendant who presents no obvious signs of carrying a weapon." *State v. McGirt*, 468 S.E.2d 833, 835 (N.C. Ct. App. 1996), *adopted* in *State v. McGirt*, 481 S.E.2d 288 (N.C. 1997). This holding is grossly inconsistent with a persuasive and uniform line of authority. It is also rooted in a grave misunderstanding of the United States Supreme Court's interpretation of the Fourth Amendment. Even assuming, *arguendo*, that a defendant's prior criminal history *could* — in and of itself — permit the reasonable inference that the defendant is armed, it does not lead to the reasonable inference that the defendant is *presently dangerous*, at least where the defendant has been stopped for a minor traffic infraction. Absent other particularized circumstances, a reasonable inference of present danger can emerge only when the defendant is suspected of either presently engaging in, or having immediately prior to the stop engaged in, some violent criminal conduct.

Here, the Petitioner failed to wear his seat belt. Nothing about his conduct suggested that he was either armed or presently dangerous. Nor, given the fact that the stop occurred at about 9:30 a.m., did anything in the circumstances of the stop suggest that he was armed or presently dangerous. Absent such particularized circumstances, the Petitioner could not be constitutionally searched. This Court should, therefore, reverse the lower court's decision and vacate the judgment

against the Petitioner.

B. THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA CONFLICTS SHARPLY WITH CLEAR AND UNIFIED AUTHORITY UNDER WHICH A PAT DOWN SEARCH OF AN INDIVIDUAL SUSPECTED OF INVOLVEMENT IN A DRUG TRANSACTION IS ONLY CONSTITUTIONAL, ABSENT OTHER PARTICULARIZED CIRCUMSTANCES, IF THE STOP WAS EFFECTED TO INVESTIGATE SUCH INDIVIDUAL'S DRUG RELATED ACTIVITY.

Absent other particularized circumstances, a pat down frisk of even an individual suspected of involvement in a drug transaction is impermissible if conducted during a stop not effected to investigate such individual's drug related activity. A long line of authority clearly holds that, absent other particularized circumstances, a pat down frisk of such an individual is constitutionally permissible only if it follows a stop effected to investigate such individual's drug related activity.[2]

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[2]Some courts have gone even further by holding that a pat down frisk of an individual suspected of involvement in a drug transaction is constitutionally impermissible, even if it stems from a stop effected to investigate drug related activity, if no other particularized circumstances are present. Thus, in *State v. Evans*, the trial court's conviction of the defendant for possession of marijuana with intent to deliver was reversed on the grounds that no such particularized circumstances were present. On the contrary, the defendant was cooperative and the search was conducted in broad daylight. Even though the defendant was engaged in a drug related activity, there were no actions indicating that the defendant might be armed. *State v. Evans*, 373 N.W.2d

> *State v. Guy* is illustrative of the point. In *Guy*, the police entered a residence in order to execute a warrant issued under probable cause that cocaine trafficking was taking place therein. *State v. Guy*, 492 N.W.2d 311 (Wis. 1992). After the police seized evidence from the defendant in a pat down search, the defendant was convicted of possession of cocaine with intent to deliver. The Wisconsin Supreme Court held that the pat down search was permissible. "Here, the officer was executing a warrant for cocaine. This is the *kind of transaction* that may give rise to sudden violence." *Id.* at 315 (emphasis added). In emphasizing the *kind* of transaction, rather than the *status* of the defendant, the court implied that the danger which justified the otherwise impermissible search arose from the fact

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836 (Minn. App. 1985). Similarly, in *United States v. Trullo*, the defendant was stopped on suspicion of involvement in narcotics transactions. The court implies that this involvement in a narcotics transaction created merely a generalized suspicion. However, "once the officer noticed the bulge in appellant's pocket these generalized suspicions became particularized, permitting the minimal intrusion of a limited search of appellant's outer clothing." *United States v. Trullo*, 809 F.2d 108 (1st Cir. 1987). *See also United States v. Vasquez*, 634 F.2d 41 (2nd Cir. 1980) (defendant's involvement in narcotics trafficking, combined with the fact that, during stop, defendant bent down and reached under his seat, justified pat down frisk); *United States v. Pajari*, 715 F.2d 1378 (8th Cir. 1983) (pat down search for weapons was constitutionally permissible where defendant, having been investigated for cocaine trafficking for a long time, during stop reached down in front of the seat near the area of his feet as if reaching for a weapon); *United States v. Gilliard*, 847 F.2d 21 (1st Cir. 1988) (pat down search of defendant, stopped to investigate his participation in a narcotics sale, justified after officers observed him acting peculiarly and nervously in searching for his driver's license).

that the defendant was presently engaged in an illegal transaction, not merely from the fact that the defendant was a drug dealer.

This conclusion is indeed intuitive. It is far more likely that a defendant would use a weapon to resist arrest when under suspicion for a major criminal activity than when under suspicion for a minor traffic offense. Assuming, *arguendo*, that a known drug dealer is equally likely to be armed under both circumstances, this satisfies only one prong of the *Terry* test. The officer must also reasonably believe that the defendant is presently dangerous. While this is certainly credible in a case in which the officer stops the defendant in order to investigate the defendant's involvement in a drug related transaction, it is not credible in a case — like that at bar — in which the officer is investigating the defendant for the infraction of failing to wear a seat belt.

In *United States v. Oates*, the Second Circuit Court of Appeals considered the constitutionality of an agent's pat down search of a defendant who was stopped under suspicion that he was carrying narcotics. *United States v. Oates*, 560 F.2d 45 (2nd Cir. 1977). The court recognized that, to dealers in narcotics, firearms are often "tools of the trade." *Id.* at 62. However, the court implicitly linked the reasonableness of the inference that the defendant was armed and dangerous to the defendant's conduct, not the defendant's status as a dealer in narcotics. In this case, "the belief of the police officer that the suspect may be armed and dangerous can be predicated on the *nature of the criminal activity* involved." *Id.* at 62 (emphasis added). When applied to the case at bar, *Oates* supports — rather than refutes — the Petitioner's contention that the pat down search of Petitioner was impermissible since here, in contrast to *Oates*, the Petitioner was not engaged in any drug related criminal activity at the time of the stop. Petitioner's

only offense was his failure to wear a seat belt.

Finally, in *United States v. Brown*, officers stopped the defendant's car because they had "an articulable reasonable suspicion" that the car's occupants were dealing drugs. *United States v. Brown*, 913 F.2d 570 (8th Cir. 1990). Again, the United States Court of Appeals for the Eighth Circuit based its decision to admit the seized evidence on its view that the nature of this transaction — rather than the defendant's status as a drug dealer — could permit the reasonable inference that the defendant was, at the moment of the stop, armed and presently dangerous. "Since weapons and violence are frequently associated with drug *transactions*, the officers reasonably believed that the individuals with whom they were dealing were armed and dangerous." *Id.* at 572 (emphasis added).

By affirming the admission of evidence seized during a pat down search of the Petitioner, when the Petitioner was not stopped for any drug related activity and in the absence of any other particularized circumstances, the Supreme Court of North Carolina has acted contrary to the clearly established authority of both the federal Courts of Appeals and the State courts of last resort. Had the Petitioner been stopped for drug related activity, this search may have been permissible. Had any other particularized circumstances existed to justify the reasonable inference that the Petitioner was armed and presently dangerous, this search may have been permissible. But neither scenario represents this case. The judgment of the Supreme Court of North Carolina must therefore be reversed and the conviction must be vacated.

CONCLUSION

In *Terry v. Ohio*, Justice Douglas cautioned the Court against following the "long step down the totalitarian path." *Terry v. Ohio*, 392 U.S. at 38.

> There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today. Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime. *Id.*, 392 U.S. at 39.

In the case below, the Supreme Court of North Carolina has taken the next illogical step in that direction. The precedent established in this case — by virtue of a four to three vote — subjects any man or woman to a frisk or more intrusive "pat down" if he or she is so unfortunate as to be stopped for a minor traffic infraction. A once "sacred" and "carefully guarded" right has been reduced to a mere "form of words." When a sworn officer testifies that he pats down "everyone I stop, no matter what it's for," the Fourth Amendment has lost its power to deter police misconduct.

Yet, the principle embedded in the North Carolina Supreme Court's decision has even further reaching implications. If a respected attorney is driving his client, a known current or prior drug dealer, to the courthouse for trial, an officer who knows of the client's involvement with drugs and who happens to stop the attorney for a malfunctioning turn signal is free to pat down the client for weapons. By extension of the *McGirt* rule and under the authority of *Michigan v. Long*, the officer can even search the interior of the attorney's car.

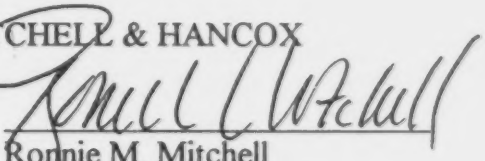
See Michigan v. Long, 463 U.S. 1032 (1983) (officer may search any part of the interior of a car which is within the immediate control of one who the officer reasonably believes is armed and presently dangerous). Inchoate belief would give rise to a kinetic overreaching by the police, an intolerable result.

Should this Court, by denying the Petitioner's petition for writ of certiorari, choose to turn a blind eye toward the continued evisceration of the Fourth Amendment, the concept of constitutional protection against unreasonable searches and seizures will essentially be nothing more than a mere form of words cast upon the waters of constitutional dilution, only to return void. The additional "hydraulic pressure" brought to bear by the precedent in this case will clearly deprive the individual of any sovereignty and bring to full fruition Justice Douglas' ominous prophecy of a new regime.

This court should grant discretionary review, reverse the decision of the Supreme Court of North Carolina, and vacate the judgment against the Petitioner.

This the 3rd day of June, 1997.

HARRIS, MITCHELL & HANCOX

By: 

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Appeals of North Carolina

STATE OF NORTH CAROLINA

vs.

TONY RAY McGIRT

No. COA95-701

COURT OF APPEALS OF NORTH CAROLINA

468 S.E.2d 833, 122 N.C. App. 237,

April 16, 1996, Filed

Scotland County Nos. 94 CRS 8004, 8005. Appeal by defendant from judgment entered 20 April 1995 in Scotland County Superior Court by Judge B. Craig Ellis.

COUNSEL

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth Rouse Mosley, Fayetteville, NC for the State. Doran J. Berry and Ronnie M. Mitchell for defendant-appellant.

JUDGES

GREENE, Judge, Judge LEWIS concurs. Judge SMITH dissents.

AUTHOR: GREENE

OPINION

GREENE, Judge.

Tony Ray McGirt (defendant) appeals from the trial court's order,

denying his motion to suppress a gun found during a search of his person. After the trial court denied defendant's motion, defendant pled guilty to possession of a firearm by a felon, in violation of N.C. Gen. Stat. § 14-415.1, and carrying a concealed weapon, in violation of N.C. Gen.Stat. § 14-269.

It is undisputed that on 27 October 1994 at about 9:30 a.m., Deputy Tommy Butler (Butler) of the Scotland County Sheriff's Department stopped defendant, who was driving a vehicle on a public street, for failure to wear his seat belt. Butler testified at the suppression hearing that he "had been looking for [defendant's] vehicle the previous night" and was "conducting an investigation on [defendant] for cocaine trafficking." Butler knew, at the time, that defendant had prior felony drug convictions and in his experience knew that "cocaine traffickers normally carry weapons."

The trial court found that after stopping defendant for the seat belt violation, Butler asked defendant for his license, which defendant produced, and asked defendant to exit the vehicle. Defendant complied with Butler's request and exited the vehicle, at which point Butler asked defendant if he had anything on him. Defendant answered, "No," and raised his hands. Butler then frisked defendant and felt a hard object, which Butler believed to be a gun. Butler asked defendant to identify the object, to which defendant replied that it was a pistol and handed the .22 caliber pistol to Butler. At that point, Butler arrested defendant for carrying a concealed weapon and possession of a weapon by a felon. The trial court then concluded as a matter of law that Butler had probable cause to stop defendant's vehicle, because of defendant's

seat belt violation. The trial court further concluded that Butler possessed "reasonable grounds to ask the defendant to exit his car and had [a] reasonable articulable suspicion which gave him the right to pat down the defendant for weapons." Finally, the trial court concluded that the search did not violate defendant's statutory or federal or state constitutional rights. Accordingly, defendant's motion to suppress was denied.

The issues are (I) whether Butler had the authority to ask defendant to exit his car; and if so, (II) whether Butler had a right to "pat-down" defendant for weapons.

We first note that the stop of defendant's vehicle for a seat belt violation may have been pretextual and thus unconstitutional. **State v. Morocco,** 99 N.C. App. 421, 427, 393 S.E.2d 545, 548 (1990) (police may not make stops "merely on the pretext of a minor traffic violation"). The nature of the stop, however, has not been raised by the defendant as a basis to support his motion to suppress.

I

Assuming that the stop itself was lawful, did the officer have the authority to ask the defendant to exit the automobile? This requires a weighing of the interest of the State in the personal safety of the officer and the interest of the defendant against an intrusion into his personal liberty. **Pennsylvania v. Mimms,** 434 U.S. 106, 109-11, 54 L. Ed. 2d 331, 336-37, 98 S. Ct. 330 (1977). Because face-to-face confrontations outside the automobile "reduce[] the likelihood that the officer will be the victim of an assault" and because exiting the automobile is not a "serious intrusion upon the sanctity of the person," the Fourth Amendment's proscription of

unreasonable searches and seizures is not violated when the police order the driver of a lawfully detained vehicle to exit the vehicle. **Id.**

II

A routine traffic stop, as we have in this case, is similar to a street encounter for investigation and does not justify in every instance a protective search for weapons. "To allow the police to routinely search for weapons in all such instances would . . . constitute an 'intolerable and unreasonable' intrusion into the privacy of the vast majority of peaceable citizens who travel by automobile." 3 Wayne R. LaFave, **Search and Seizure** § 5.2(h), at 96 (3d ed. 1996) (quoting **United States v. Robinson,** 153 U.S. App. D.C. 114, 471 F.2d 1082 (D.C. Cir. 1972)). The police are, however, permitted to conduct a "pat-down" for weapons once the defendant is outside the automobile, and if the circumstances give the police reasonable grounds to believe that the defendant may "be armed and presently dangerous." **Mimms,** 434 U.S. at 112, 54 L. Ed. 2d at 337; **United States v. Robinson,** 153 U.S. App. D.C. 114, 471 F.2d 1082, 1097 (D.C. Cir. 1972), **rev'd on other grounds,** 414 U.S. 218, 38 L. Ed. 2d 427, 94 S. Ct. 467 (1973) (note 6, Court only addresses full custodial arrest situation); **see Terry v. Ohio,** 392 U.S. 1, 20-22, 20 L. Ed. 2d 889, 905-06, 88 S. Ct. 1868 (1968).

In this case, the evidence can support a conclusion that the officer had reasonable grounds to believe the defendant might be armed and dangerous. The evidence reveals: (1) defendant was a convicted felon and this was known to the arresting officer; (2) defendant was under

investigation, by the arresting officer, for cocaine trafficking; and (3) it was the officer's experience that cocaine traffickers "normally carry weapons." The totality of these circumstances, even in the face of a cooperative defendant who presents no obvious signs of carrying a weapon, supports the conclusion of the trial court and thus its order denying the motion to suppress.

Although argued by the State as an alternative basis to support the order of the trial court, we do not reach the question of whether the defendant consented to the search, because the State asserts no cross-assignment of error to support that argument in this Court. N.C. R. App. P. 10(d).

Affirmed.

Judge LEWIS concurs.

Judge SMITH dissents.

DISPOSITION

Affirmed.

DISSENT

SMITH, Judge, dissenting.

I respectfully dissent, as I do not think the police officer in this case had reasonable grounds to believe that defendant was "armed and presently dangerous," **Pennsylvania v. Mimms,** 434 U.S. 106, 112, 54 L. Ed. 2d 331, 337, 98 S. Ct. 330 (1977), nor do I think the State has met its

burden of showing that defendant consented to the frisk or search of his person or that the search was otherwise lawful. **See State v. Hunt,** 37 N.C. App. 315, 246 S.E.2d 159, **disc. review denied,** 295 N.C. 736, 248 S.E.2d 865 (1978).

Defendant first argues the trial court erred in concluding that the deputy had reasonable grounds to ask defendant to exit the car and to subsequently search defendant's person. While an officer may ask a vehicle occupant to exit the car as a precautionary measure for his own protection, he may not search the person unless there exists objective facts justifying a conclusion that the subject could be armed and presently dangerous. **Timms,** 434 U.S. at 112, 54 L. Ed. 2d at 337. The burden is upon the State to show that "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." **Terry v. Ohio,** 392 U.S. 1, 27, 20 L. Ed. 2d 889, 909, 88 S. Ct. 1868 (1968); **see State v. Butler,** 331 N.C. 227, 415 S.E.2d 719 (1992).

Here, the officer stopped defendant for failure to wear his seat belt. The majority holds that, because the officer knew defendant was a convicted felon under investigation for cocaine trafficking and that it was the officer's experience that cocaine traffickers "normally carry weapons," the officer was justified in doing a pat-down search of defendant. However, in this case defendant was not stopped for suspicious drug activity. Rather, he was stopped for failure to wear his seat belt. He cooperated fully with Officer Butler and offered no threat or resistance. In addition, Officer Butler's testimony that he pats down everyone he stops,

"no matter what it's for," supports the conclusion that he did not believe defendant was presently dangerous in this case. In my opinion, the State has not shown that a reasonably prudent man in the same circumstances would have been warranted in the belief that defendant was armed and **presently** dangerous. For this reason, I disagree with the majority's holding that the evidence supports a conclusion that there were reasonable grounds to justify the officer's pat-down search of defendant.

In its brief, the State argues that, even if there were no objective facts to support the officer's conclusion that defendant was presently dangerous, defendant's Fourth Amendment rights were not violated, because by his conduct defendant consented to the search of his person. With this contention, I disagree.

It is well settled that a consensual search is constitutionally permissible as long as the consent is given freely and voluntarily, without coercion, duress or fraud. **Schneckloth v. Bustamonte,** 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973); **State v. Powell,** 297 N.C. 419, 255 S.E.2d 154 (1979). To be voluntary, it must be shown that waiver was "not given merely to avoid resistance." **State v. Little,** 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967). "The question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." **Schneckloth,** 412 U.S. at 227, 36 L. Ed. 2d at 862-63; **State v. Williams,** 314 N.C. 337, 333 S.E.2d 708 (1985).

In this case, the only facts regarding defendant's consent as found by the

trial court were that, when the deputy asked defendant whether he had anything on him, defendant replied, "No" and raised his hands. The trial court made no conclusion as to what defendant intended by raising his hands. The State argues that, by raising his hands, defendant implied "to an objectively reasonable person that he was **voluntarily** consenting to a pat-down search." I disagree.

The State's evidence that defendant raised his arms is insufficient to demonstrate the voluntariness of defendant's consent to be searched for weapons. At best, it shows an equivocal action which does not clearly evince consent to search. In order to meet its burden in this case, the State was required to show that defendant's consent was "'unequivocal and specific,'" **Little,** 270 N.C. at 239, 154 S.E.2d at 65 (quoting **Judd v. United States,** 89 U.S. App. D.C. 64, 66, 190 F.2d 649, 651). To meet this burden, the State must establish by "clear and positive testimony that consent was so given." **Id.**

In this case, defendant could have been raising his arms as an act of submission to Officer Butler. Defendant's gesture could have been nothing more than a shrug, in which case, he was certainly not giving consent to search. Lastly, the gesture may have been an indication to the officer that defendant posed no physical threat. From the record before us, defendant's motivation for the gesture is simply unknown. Examining the totality of the circumstances in this case, I am of the opinion that the State has not met its burden of proving defendant consented

to be searched. In such case, there is a presumption against waiver of fundamental constitutional rights. State v. Vestal, 278 N.C. 561, 579, 180 S.E.2d 755, 767 (1971). For the foregoing reasons, I dissent from the majority's opinion.

A TRUE COPY

Clerk of the Court of Appeals

of North Carolina

By: _____

Deputy Clerk_____, 19__

STATE OF NORTH CAROLINA

vs.

TONY RAY McGIRT

No. 198A96

SUPREME COURT OF NORTH CAROLINA

481 S.E.2d 288

March 7, 1997, Filed

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 122 N.C. App. 237, 468 S.E.2d 833 (1996), affirming a judgment entered by Ellis (B. Craig), J., on 20 April 1995 in Superior Court, Scotland County. On 5 September 1996 this Court retained defendant's notice of appeal as to a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1).

COUNSEL

Michael F. Easley, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State.

Doran J. Berry and Ronnie M. Mitchell for defendant-appellant.

American Civil Liberties Union of North Carolina Legal Foundation, by Deborah K. Ross, amicus curiae.

OPINION

PER CURIAM.

Justices Webb, Whichard, Parker and Lake voted to affirm the decision of the Court of Appeals for the reasons stated in the majority opinion by Greene, J. Chief Justice Mitchell and Justices Frye and Orr voted to reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion by Smith, J. Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

DISPOSITION

AFFIRMED.

FILED

March 7, 1997

In the Office of Clerk, Supreme Court

of North Carolina